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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 814

AMERICAN EXPORT LINES, INC. AND ATLANTIC AND GULF STEVEDORES, INC., *Petitioners,*

v.

JOSEPH S. PROVENZA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Daily Record Co., Baltimore 3, Md.

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JOSEPH S. PROVENZA, *Respondent*.

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American Export Lines, Inc., and Atlantic and Gulf Stevedores, Inc., Petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on November 4, 1963. A timely petition for rehearing by the court en banc filed on November 29, 1963 (R. 18-26) was denied on January 7, 1964 (infra, Appendix C, p. 14a).

Opinion Below

The opinion of the Court of Appeals (infra, Appendix A, pp. 1a-12a) is reported at 324 F. 2d 660.

Jurisdiction

The judgment of the Court of Appeals was entered on November 4, 1963 (infra, Appendix B, p. 13a) and a petition

for rehearing denied on January 7, 1964 (infra, Appendix C, p. 14a). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A., Sec. 1254 (1).

Questions Presented

Are the "Safety and Health Regulations for Longshoring" promulgated by the Secretary of Labor pursuant to the Longshoremen's and Harbor Workers' Compensation Act binding on a vessel owner and must they be admitted in evidence and read to a jury and the jury instructed as to their binding effect in the trial of a civil action by a longshoreman against a vessel owner?

Statutes and Regulations Involved

The applicable statute, Section 41 of the Longshoremen's and Harbor Workers' Compensation Act, as amended (33 U.S.C.A., Sec. 941) and pertinent parts of the Safety and Health Regulations for Longshoring (29 Code of Federal Regulations, Subtitle A, Part 9, Sec. 9.1 et seq.) are set out in Appendix D.

Statement of the Case

At the trial of the case below in the United States District Court for the District of Maryland, the plaintiff longshoreman, Joseph S. Provenza, a Maryland citizen, sought damages against American Export Lines, Inc., a foreign corporation, for injuries sustained on the S.S. EXAMINER when the vessel's starboard winch "cut out" causing a draft of cargo which was being moved across the deck towards the square of the hatch to drop onto metal hatch beams stowed on the deck, tipping one or more of the beams against the legs of the plaintiff and injuring him. Jurisdiction in the District Court was based on diversity of citizenship, 28 U.S.C.A., Sec. 1332. By a third-party complaint, American Export Lines, Inc. sought indemnity

from Atlantic and Gulf Stevedores, Inc., the employer of the plaintiff.

It was contended by the plaintiff that the ship was negligent and rendered unseaworthy because the starboard winch was defective and because of the manner in which and place where the hatch beams were stowed on the deck. There was conflicting testimony on both of these factual issues. The plaintiff at the close of his case against the vessel owner, offered in evidence the Safety and Health Regulations for Longshoring and an objection by counsel for the vessel owner to their admission was sustained (R.I. 63). The case was submitted to the jury under admittedly full and complete instructions on the maritime law of unseaworthiness and negligence as applied to the facts of the case (see Appendix A, pp. 3a-4a). The jury found that the vessel was not unseaworthy with respect to the starboard winch or as to the place or manner of stowing the hatch beams on the deck of the vessel. Judgment was thereupon entered in favor of defendant, American Export Lines, Inc., and the third-party complaint against Atlantic and Gulf Stevedores, Inc., was marked "moot".

On appeal to the United States Court of Appeals for the Fourth Circuit, the plaintiff alleged a number of errors in the charge to the jury, and also contended that the trial judge should have admitted in evidence against the vessel and read to the jury as binding against the vessel owner certain of the "Safety and Health Regulations for Longshoring" (29 C.F.R., Sec. 9.43 (b) and (c) and Sec. 9.91, Appendix D, p. 21a) promulgated by the Secretary of Labor under the Longshoremen's and Harbor Workers' Compensation Act as amended (33 U.S.C.A., Sec. 941, Appendix D, pp. 15a-18a). In the Court of Appeals, Petitioners contended that the Regulations were properly excluded since by their express terms they did not apply to vessel

owners (29 C.F.R., Sec. 9.2 (a) and (b), Appendix D, p. 20a), and also urged that the trial judge had included in his charge rules of care equivalent to those set out in the Regulations (R.I. 66, 68, 70, 72, 74-75). The Court, while rejecting all other points asserted by the plaintiff as grounds for reversal, adopted his contention with regard to the Regulations, and in a 2 to 1 decision (Circuit Judge Albert V. Bryan dissenting), reversed the judgment in favor of the shipowner, reinstated the third-party claim against the stevedore, and remanded the case for a retrial, stating (Appendix A, p. 6a):

> "We are unable to escape the conviction that it was error for the Court not to read the regulations as requested and charge the jury that they were binding in law."

Reasons for Granting the Writ

This case involves a previously undecided point of law of vital importance in the field of maritime personal injury litigation. It is the first case in which any court in the country has held in a personal injury suit by a longshoreman that the Safety and Health Regulations for Longshoring are admissible in evidence and binding in law against a vessel owner and must be read to a jury on the issues of unseaworthiness and negligence. This ruling was made below despite the fact that the Regulations themselves (29 C.F.R., Sec. 9.2 (b)) explicitly provide that they were not intended to place additional responsibilities or duties on owners, operators, agents or masters of vessels (Appendix D, p. 20a).

The effect of the decision below will be greatly to extend such responsibilities and duties by subjecting the vessel owner to liability whenever a stevedore violates any one of a comprehensive set of working rules. The decision will render obsolete the concept of unseaworthiness as it has

evolved in a long series of decisions by this Court. This is made apparent in the following statement in the opinion of the Court of Appeals (Appendix A, pp. 8a-9a):

> "Prior to the enactment of 33 U.S.C.A., Sec. 941 and the promulgations of the regulations thereunder what constituted negligence or unseaworthiness was to be determined by the jury under the definitions laid down by the courts. Now, with respect to longshoring, the statute law of the United States has laid down definite standards, and we think the plaintiff longshoreman is entitled to have those standards applied to both the defendants in this case."

The Court below reached this conclusion despite the fact that the Regulations expressly state they are to apply only to employers of longshoremen and not to vessel owners. Thus, the foreword to the Regulations (Appendix D, p. 19a) states that they are "mandatory with respect to *employers** subject to the Act." Sec. 9.1 (a) of the Regulations (Appendix D, p. 19a) states that they are designed to carry out the intent of Public Law 85-742 (33 U.S.C.A., Sec. 941) that every *employer* of employees covered by the Longshoremen's and Harbor Workers' Compensation Act "shall install, furnish, maintain, and use such devices and safeguards with particular reference to equipment used by and working conditions established by such *employers* as the Secretary may determine by regulation or order to be reasonably necessary to protect the life, health and safety of such employees, and to render safe such employment and places of employment, and to prevent injury to *his employees*." Sec. 9.1 (b) (Appendix D, p. 20a) provides that the regulations do not make determinations with respect to matters under the control of the United States Coast Guard under 46 U.S.C.A., Secs. 1-1388, "including

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* Emphasis supplied throughout.

but not restricted to, the master, ship's officers, crew members, design, construction, and maintenance of the vessel, its gear and equipment . . ." And Sec. 9.2, Scope and Responsibility (Appendix D, p. 20a), provides:

> "(a) The responsibility for compliance with the regulations of this part is placed upon *employers* as defined in Section 9.3 (c) of this part." (i.e., employers of longshoremen).
>
> "(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom."

All of these provisions clearly show that the Regulations are applicable only to "employers" and "employees" and do not attempt to govern with respect to rights by and between a ship or its owner and an employee of an independent contractor. A vessel owner would come within the ambit of the Regulations only if he were an employer of longshoremen. This is well expressed in Circuit Judge Bryan's dissenting opinion where he said (Appendix A, p. 11a):

> "No error, it seems to me, can be found in the refusal of the trial court to submit to the jury the 'Safety and Health Regulations for Longshoring'. In explicit language the regulations themselves exclude this use of them. There is no ambiguity or contradiction in the exclusion . . . Its object is altogether plain: that the regulations should not be taken as adding to, subtracting from, or in any other way affecting the responsibilities of a ship, her owners or operators to one not in their employ. Intrusion into that area was studiedly avoided."

If Congress had intended that the Regulations be utilized in personal injury actions as a standard of care it would have been easy to express such an intent. No such provision is made, although the authorizing Act does make explicit provision with regard to judicial proceedings in other ways, such as providing for jurisdiction in the District Courts to restrain violation of the Regulations (33 U.S.C.A., Sec. 941(e)) and for criminal fines up to $3,000 for wilfull violation of or non-compliance with any regulation (33 U.S.C.A., Sec. 941(f)) (Appendix D, pp. 17a, 18a).

The legislative history of the Act authorizing the regulations makes clear that they were not intended to enlarge the warranty of seaworthiness. At least four bills were under consideration by the Congress in 1958 to achieve safety rules and regulations for the stevedoring industry. Three of the bills originated in the Senate (S. 1454, S. 3277 and S. 3486) and one in the House (H.R. 13021). The first of the three Senate bills, S. 1454, by its terms would have applied not only to the stevedoring company employer, but also to "every owner, operator, or lessee of a vessel." However, in the law as finally passed (H.R. 13021), the language making the Act applicable to owners, operators or lessees of vessels, as well as employers of longshoremen, was omitted and the duty to furnish safe places of employment placed only upon the "employer". The fact that the legislation was not designed to apply to vessel owners is specifically evidenced by the report of Senator Kennedy of Massachusetts accompanying one of the original bills, the so-called "Kennedy-Ives Bill" (S. 3486). Senate Report No. 1788, 85th Congress, Second Session, submitted by Senator Kennedy, states with reference to the purpose of the bill (p. 6):

> "The contention was made by employer interests that the potential liability of shipowners in damage

actions may be enhanced by this bill. The obligations under S. 3486, however, would be imposed only on those employers utilizing the services of longshoremen, ship repairmen and servicemen. These are not, as a rule, shipowners."

Further, at page 7 of Senate Report No. 1788:

"In view of the fact that the persons who will be responsible for safety under S. 3486 will be the employers of longshoremen and ship repairmen, namely, stevedoring and ship repair contractors, *not shipowners*, the committee foresees no problems in the administration of the program whether work is to be performed in domestic or foreign ships." (Emphasis supplied.)

It is obvious from the Senate Report that those concerned, in drafting the legislation did not contemplate that the safety regulations authorized would establish a standard enhancing the liability of vessel owners. The express exclusion of vessel owners in the regulations themselves and the limitation of responsibility for compliance to "employers" is clear administrative recognition of the legislative purpose.

The case of *Kernan v. American Dredging Co.*, 355 U.S. 426, 2 L. Ed. 2d 382, 78 S. Ct. 394 (1958) referred to by the Court of Appeals in its opinion, does not call for a different result. In *Kernan* this Court held in a 5 to 4 decision that recovery could be had under the Jones Act for death resulting from violation by a shipowner of a Coast Guard regulation requiring a scow to carry a navigation light eight feet above the water. A lantern on the scow three feet above the water ignited fumes from petroleum waste products on the surface of the water causing a fire which brought about the seaman's death. Although the purpose of the regulation was to guard against collision and not fire, the majority found liability based on prior

decisions under the Federal Employer's Liability Act, which had held recovery could be had for injuries resulting from violation of the Safety Appliance Act or Boiler Inspection Act without regard to whether the casualty was of the type the statute was designed to prevent.

As suggested in the opinion below, *Kernan* can be distinguished in this case because it involved a regulation which applied to the shipowner, while in the case at bar the regulations by their express terms apply only to the stevedore. It is also to be noted that the decisions under the Federal Employers Liability Act have found a Congressional purpose expressed in the provisions of the Act to make violation of the Safety Appliance and Boiler Inspection Acts conclusive on the issue of negligence in personal injury suits by employees against railroads. No such Congressional intent could be found here; instead, it has been expressly disclaimed both in Congressional reports dealing with the authorizing Act and in the regulations themselves.

The Court below takes the view that the regulations create no new duty on the shipowner — that his duty to furnish a seaworthy ship is unchanged, but that resort may be had to the regulations to determine whether the duty has been met. Not to read the regulations to the jury, in the view of the Court, would be to render the regulations meaningless and ineffective. However, as observed in the dissent by Judge Bryan, to say that the regulations merely evidence standards of care and do not create a duty is an over-nice distinction. The regulations create a whole host of specific duties for the stevedore, and if imported into the definition of unseaworthiness would do the same as to vessel owners despite the expressed intent of the regulations not to do so. It is submitted that the Regulations

remain meaningful and effective if confined to their true purpose — the enforcement against stevedoring companies by the Secretary of Labor of a comprehensive safety program for longshoremen.

Conclusion

It is submitted that the sweeping change in the maritime law announced in the decision below if allowed to stand will have such a radical effect on the legal liability of both vessel owners and stevedores that the case warrants the consideration of this Court. It is a case of nationwide importance involving a serious question of the construction of a federal statute and regulations adopted thereunder.

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APPENDIX A

OPINION BELOW

(Reported at 324 F.2d 660)

United States Court of Appeals
For the Fourth Circuit

No. 8959

Joseph S. Provenza,
Plaintiff, Appellant,
versus
American Export Lines, Inc.,
Defendant and Third-Party Plaintiff,
Appellee;
and
American Export Lines, Inc.,
Defendant and Third-Party Plaintiff,
Appellant,
versus
Atlantic and Gulf Stevedores, Inc.,
Third-Party Defendant,
Appellee.

Appeals from the United States District Court for the District of Maryland, at Baltimore
(Edward S. Northrop, District Judge)

(Argued June 6, 1963. Decided November 4, 1963.)

Before Sobeloff, Chief Judge, and Bryan and J. Spencer Bell, Circuit Judges.

John J. O'Connor, Jr. (O'Connor and Preston on brief) for Joseph S. Provenza; Southgate L. Morison (Ober, Williams, Grimes & Stinson on brief) for American Export Lines, Inc.; and Herbert F. Murray (Clater W. Smith, Robert E. Powell, and Smith, Somerville & Case on brief) for Atlantic and Gulf Stevedores, Inc.

J. SPENCER BELL, Circuit Judge:

The plaintiff, a longshoreman, brought this action against the shipowner, American Export Lines, Inc., for injuries which occurred during loading operations, alleging unseaworthiness, negligence, and violation of safety regulations promulgated by the Secretary of Labor under the Harbor Workers' Compensation Act as amended. (33 U.S.C. 941). The shipowner in turn filed a third party complaint against the stevedore employer of the plaintiff.

Plaintiff was working as a "relief deck man" when a draft of cargo being loaded into the No. 2 hatch of the SS EXAMINER swung back in a pendulum-like motion, striking some metal hatch beams which fell or tipped over on the plaintiff's legs and broke them. The beams had been removed from the square of the hatch and stored on the inshore side of the ship between the hatch coaming and the waistplate. The testimony was conflicting as to whether or not and, if they were, how securely the beams were lashed. The plaintiff was standing between the beams and the ship rail near the after end of the hatch, from which point he was signaling to the winch drivers and giving orders to the men on the pier. Two winches located at the forward end of the hatch were being used to work the cargo in cooperation. The "inshore" winch picked up the draft and raised it above the level of the ship's rail and the hatch coaming; the "up and down" winch then pulled the load over the hatch opening preparatory to lowering it into the hold. As the cables of both winches were attached to the same load, they were in effect pulling against each other as the load was pulled from the pier to the hatch, thus it was necessary for the inshore winch to pay out its cable as the "up and down" winch retracted its line. During this

operation, the up and down winch cut out while the inshore winch continued momentarily to pay out its line. This relieved the tension on the "joint" line, causing the load to swing down, striking the hatch beams, one or more of which struck the plaintiff. There was a conflict of evidence as to whether the "up and down" winch had previously cut out on several occasions that morning. There was also conflicting evidence as to whether the winch was in proper operating condition. The plaintiff contended both that the winch was in an unseaworthy condition and that both the manner and place of storing the hatch beams constituted the ship unseaworthy with respect thereto. The usual interrogatories on seaworthiness, negligence, and contributory negligence were submitted. The court charged the jury that if they found the ship to be seaworthy in all respects they need not reach the other interrogatories. The jury answered the first interrogatory as follows:

1. Was the SS EXAMINER unseaworthy with respect to:

   (a) the starboard winch of the Number 2 hatch?
   Answer ("yes" or "no") NO

   (b) the place and or the manner of stowing the hatch beams on the deck of the vessel?
   Answer ("yes" or "no") NO

The plaintiff appeals, alleging numerous errors in the trial of the case. Upon a reading of the charge as a whole we must reject the plaintiff's contention, which is the basis for many of his specific objections, that the charge devitalizes the doctrine of unseaworthiness. The charge is relatively long, and the court conscientiously undertook meticulously to present the contentions of each of the parties on the many points of law involved. It appears to us that the jury could not have failed to understand the court's statement that:

> "Liability for an unseaworthy condition does not in any way depend upon negligence or fault or blame, that is to say: the shipowner is liable for all the injuries and consequent damage proximately caused by

> an unseaworthy condition existing at any time even though the owner may have exercised due care under the circumstances and may have had no notice or knowledge of the unseaworthy condition which proximately caused the damage."

The substance of this statement was repeated several times. We agree with the trial court that while the duty to furnish a seaworthy vessel is an absolute, inalienable, non-delegable and continuing duty of the shipowner it does not make him an insurer of the safety of his crew. A seaworthy ship is one which is reasonably fit for its intended use. *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 213 (1963); *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960); *Grzybowski v. Arrow Barge Co.*, 283 F. 2d 481, 484 (4 Cir. 1960); *Ross v. Steamship Zeeland*, 240 F. 2d 820 (4 Cir. 1957). We find no such repetitive emphasis on the limitations to the standard of seaworthiness laid down by the Supreme Court as to create an imbalance in the charge. *Ballwanz v. Isthmian Lines, Inc.*, F. 2d (4 Cir. 1963).

The court's charge concerning the possible interplay between the negligence of the stevedore, if any, and the unseaworthiness of the equipment gave ample opportunity to the plaintiff to present all of his theories involving several combinations of the above factors.

We also agree with the court's conclusion that in the factual context of the case a finding that the vessel was seaworthy obviated the possibility of negligence proximately causing the plaintiff's injury. "Since unseaworthiness affords longshoremen recovery without fault and has been broadly construed by the courts; e.g., Mahnich v. So. S.S. Co., . . . it will be rare that the circumstances of an injury will constitute negligence but not unseaworthiness." *Pope and Talbot, Inc. v. Hawn*, 346 U.S. 406, 418 (1953) (concurring opinion of Justice Frankfurter).

We next come to the plaintiff's contention that the court erred in refusing to submit to the jury his claim of negligence and unseaworthiness predicated upon violation of the "Safety and Health Regulations for Longshoring" (29

C.F.R. §9.1, et seq.) promulgated by the Secretary of Labor under the authority of Public Law 85-742, 72 Stat. 835, 33 U.S.C.A. §941, et seq. The 1958 amendment to the Longshoremen's and Harbor Workers' Compensation Act was Congress' effort "to provide for establishing and enforcing an effective safety program in . . . [the] hazardous occupation [of Longshoring] . . . ."[1].

Plaintiff contends that the violation of these regulations[2], no matter by whom violated, ipso facto makes the shipowner liable either on the theory of negligence or unseaworthiness. He relies upon *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958). That action was an exoneration and limitation proceeding involving the death of a seaman

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[1] The House Report accompanying the 1958 Amendment to the Longshoremen and Harbor Workers' Compensation Act points out that stevedoring is the most hazardous of all industries which report their experience to the Bureau of Labor Statistics, having an injury frequency rate of seven times that of manufacturing. (1958 U.S. Code and Cong. News, p. 3843.) Section 41 of the Act (33 U.S.C.A. §941(a)) reads:

"Every employer shall furnish and maintain employment and places of employment which shall be reasonably safe for his employees in all employments covered by this chapter and shall install, furnish, maintain, and use such devices and safeguards with particular reference to equipment used by and working conditions established by such employer as the Secretary may determine by regulation or order to be reasonably necessary to protect the life, health, and safety of such employees, and to render safe such employment and places of employment, and to prevent injury to his employees."

[2] The regulations pertinent to this case provide:

"§9.1—Purpose and Authority.

"(a) The Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424; 33 U.S.C. 901, et seq.) provides compensation for injuries suffered by employees when they are working for private employers within the federal maritime jurisdiction on the navigable waters of the United States, including dry docks. . . . [*The law*] *requires*, among other things, *that every employer* of the aforementioned employees *shall* install, furnish, *maintain*, and use *such* devices and safeguards with particular reference to equipment used by and *working conditions* established by such employers *as the Secretary may determine by regulation* or order *to be reasonably necessary to protect the life, health, and safety of such employees and to render safe such* employment and *places of employment*, and to prevent injury to

who had lost his life in a fire on his employer's tug, which at the time was towing a scow on the Schuylkill River in Philadelphia. The accident occurred at night, and under the Coast Guard regulations applicable the scow was to carry a white navigation light not less than eight feet above the surface of the water. The purpose of this regulation was to prevent collisions. The regulation was not complied with by the shipowner, who, instead of carrying a light no less than eight feet above the surface carried an open flame lantern on the barge three feet above the water. Fumes arising from waste petroleum products floating on the surface of the water ignited and the scow and tug were enveloped in flames, which caused the decedent's death. The trial court found that there was no negligence in carrying an open flame lantern on the barge three feet above the

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his employees'. It is the purpose of the regulations of this part to carry out the intent of Public Law 85-742. [Emphasis added.]

"§9.2—Scope and Responsibility.

(a) The responsibility for compliance with the regulations of this part is placed upon 'employers' as defined in §9.3(c) of this part.

(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.

"§9.3—Definitions.

(a) The term 'shall' indicates provisions which are mandatory.

(b) The term 'Secretary' means the Secretary of Labor.

(c) The term 'employer' means an employer any of whose employees are employed, in whole or in part, in longshoring operations. . . .

"§9.43—Handling Beams and Covers.

(b) Beams shall be laid on their sides, or stood on edge close together and lashed. . . .

(c) Strongbacks, hatch covers and pontoons shall be so placed as not to interfere with a safe walkway from rail to hatch coaming or fore and aft; and so secured that they cannot be tipped over or dragged into hatches or overboard by drafts or gear. Dunnage or other suitable material shall be used under and between tiers of strongbacks and pontoons.

"§9.91—Housekeeping.

(d) Loose paper, dunnage and debris shall be collected as the work progresses and be kept clear of the immediate work area."

water, that since the danger encountered was not of the sort that the Coast Guard navigation regulation was designed to guard against, and since there was no negligence in having a light three feet above the surface, there could be no recovery under the Jones Act.[3] The Court of Appeals affirmed[4]. The Supreme Court reversed, holding that recovery could be had under the Jones Act for the death which resulted from the violation of the statutory duty concerning lights even though there was no negligence in having the lantern three feet above the water and even though the character of the risk involved was not that which the statute was designed to guard against. In reaching this conclusion, the court relied on decisions under the Federal Employer's Liability Act, in which the court had held that recovery could be had for injuries resulting from the violation of the Safety Appliance Acts or the Boiler Inspection Act without regard to whether the injuries which flowed from the breach were the type the statute sought to prevent. Those principles developed under FELA were to be incorporated in construing the Jones Act, which grants to seamen the rights given to railroad employees under FELA.

Kernan can be distinguished, as suggested by the defendants, because the regulation in that case applied to the shipowner, whereas here the regulations by their express terms apply only to the stevedore. Nevertheless, if the violation of the regulations by the stevedore created a dangerous condition then the law is clear that the shipowner is in turn also liable, even if he did not know of the dangerous situation created by the stevedore, for that is the nature of the owner's duty of seaworthiness. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953).

In *Kernan* the minority criticized the decision on the grounds that they saw no justification for applying the principles developed under FELA (absolute liability for violation of an "off target" regulation) to the violation of

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[3] *Matter of American Dredging Co.*, 141 F. Supp. 582 (E.D. Pa. 1956).

[4] *Matter of American Dredging Co.*, 255 F. 2d 618 (3 Cir. 1958).

a Coast Guard regulation having no relationship to the cause of decedent's death. Such an argument may not be advanced here, since the regulation alleged to be violated related directly to the cause of plaintiff's injury.

We are unable to escape the conviction that it was error for the court not to read the regulations as requested and charge the jury that they were binding in law.

While the definition of seaworthiness laid down by the court[5] was correct as a general statement of law, we think the plaintiff was entitled to have put before the jury the definite standards set up in the regulations promulgated by the Secretary of Labor defining reasonably safe conditions in the exact area involved in this case. Furthermore, we are also forced to the conclusion that in the area covered by the regulations their violation would render the ship unseaworthy, and if such unseaworthiness was the proximate cause of the plaintiff's injury, it would also render the defendant shipowner liable. It follows, of course, that if the jury should find that the stevedore had violated the regulations such conduct could also constitute negligence. If in turn this negligent conduct of the stevedore were known, or by the exercise of reasonable care should have been known to the shipowner, and such negligence of the shipowner was a proximate cause of the plaintiff's injury, then he too would be liable to the plaintiff on the additional grounds of negligence.

Prior to the enactment of 33 U.S.C.A. §941 and the promulgations of the regulations thereunder what constituted negligence or unseaworthiness was to be determined

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[5] In defining unseaworthiness the court below said:

"The crucial consideration is whether the ship was in all respects pertaining to the injury reasonably fit to permit Provenza to perform his tasks aboard the ship with reasonable safety. What all this means is that the defendant, American Export Lines, owed to the plaintiff, Provenza, the duty to have the ship reasonably fit to permit him to do his work on board in the manner in which he intended to work, that is, with reasonable safety. This is true although Provenza was not employed by American Export and although other stevedores and not ship's personnel may have moved the beams and although other stevedores operated the gear, the winches furnished by the shipowner."

by the jury under the definitions laid down by the courts. Now, with respect to longshoring, the statute law of the United States has laid down definite standards, and we think the plaintiff longshoreman is entitled to have those standards applied to both the defendants in this case.

The defendant insists that the regulation is entitled to no evidential value and that the judge was correct in declining to call attention to it in his charge to the jury. The basis for this is that the regulation declares that it is not intended to place additional responsibilities or duties on shipowners or to relieve them of responsibilities or duties. The argument has only a superficial plausibility and does not withstand analysis.

The regulation casts upon the shipowner no new duty nor does it relieve him of any pre-existing duty. Now, as before the regulation was promulgated, it is incumbent on him to supply a seaworthy ship. Now, as before, if the ship becomes unseaworthy through the act of the stevedore or anyone else, and this condition is the proximate cause of an injury, the shipowner is liable. The legal duty is the same. All that the regulation does is to define how this well-established duty shall be discharged in particular circumstances by the stevedore who has undertaken to perform the shipowner's nondelegable duty: "beams shall be laid on their sides, or stood on edge close together and lashed". §9.43(b). It prescribes a standard of safety, not a new duty. Nothing in the regulation forbids its being mentioned to the jury.

Of what possible use would a safety regulation be if its sanction is withdrawn by suppressing knowledge of it from the triers of fact? How can it be determined whether a condition complained of meets the standard of safety if the jury is kept in the dark as to what that standard is? To convert the provision which disavows an intent to add to or diminish the owner's duty into a direction to keep the safety provision secret is to make the entire regulation ineffective and meaningless. We cannot attribute to the draftsman any such fatuous and self-defeating design. The

defendant's brief concedes that the purpose of the regulations was to make working conditions for longshoremen safer and thereby prevent accidents. We fail to see how it can possibly further this purpose to impose a rule of silence in respect to the regulations. We think the defendant's interpretation misreads the provision in question.

A more reasonable reading and one that observes both the language and the spirit is that *no new duty* is to be exacted where none existed before and, equally, *no existing duty* is to be excused by reason of the regulation; but the regulation's requirement may be considered by the trier of fact in determining whether its nonperformance has resulted in a failure to meet a duty incumbent upon the defendant — specifically in this instance whether an unseaworthy condition was created by leaving "I beams" loose on the deck where longshoremen were working. We so hold, for only such a reading avoids the incongruity contended for by the defendant and gives a rational effect to every part of the regulation.

This still leaves ample scope to the language of section 9.2(b) under consideration. It is to be noted that the statute provides a criminal penalty of $100 to $3000 for each conviction of a willful violation of the safety regulations prescribed pursuant thereto. As we read the statute, it means that the owner (operator, agent or master) is not amenable to such criminal penalties for the stevedore's violations; but the owner's duty to provide a seaworthy ship remains unchanged. If the stevedore makes the ship unseaworthy by violating a prescribed safety regulation, the statute says nothing either to absolve the owner from liability or to foreclose reference to the regulation in an effort to show that the condition which the stevedore caused or permitted fell short of recognized safety standards. The owner's duty does not stem from the regulation, but the regulation may be shown just like other evidence to indicate that a certain practice is safe or unsafe. While such evidence is not conclusive, it is relevant. It would be equally available to a shipowner to defend against a claim of unseaworthiness by showing that, although a longshore-

man had sustained injury, the stevedore's performance was not substandard and in fact complied with the prescribed regulations.

The judgment in favor of the shipowner is reversed, the third party claim against the stevedore is reinstated, and the case remanded for retrial.

Reversed and Remanded.

ALBERT V. BRYAN, Circuit Judge, dissenting:

No error, it seems to me, can be found in the refusal of the trial court to submit to the jury the "Safety and Health Regulations for Longshoring". In explicit language the regulations themselves exclude this use of them. There is no ambiguity or contradiction in the exclusion, which is contained in §9.2(b) in these words:

> "(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from respons bilities or duties now placed upon them by law, regulation or custom."

Its object is altogether plain: that the regulations should not be taken as adding to, subtracting from, or in any other way affecting the responsibilities of a ship, her owners or operators to one not in their employ. Intrusion into that area was studiedly avoided.

Yet, over the protest of the regulations themselves, the Court now applies them to place a duty on the defendant shipowner to a non-employee. Ordinarily, a breach of a regulation, it is true, may be evidence of a breach of the civil duty therein imposed, but certainly such proof cannot

be adduced for this purpose when, as here, the regulations by their very terms affirmatively forbid the accordance of any such effect to them.

Argument that the regulations merely evidence standards of care and do not create a duty is an over-nice distinction. The regulations were intended to, and do, declare duties of an employer to a longshoreman. Their character does not change when they are transplanted to the relationship of shipowner to non-employee. Even if there is no transfer of duty in this sense, there is obviously the creation of a duty upon the shipowner by the regulations, in that they establish a measure for determining whether the shipowner has met his general maritime and common law obligations. To fix criteria is to fix a duty.

The charge of the District Judge was, admittedly, fair and full. It embraced rules of care for the longshoreman equivalent to those demanded by the regulations. It laid upon the shipowner responsibility for any neglect by the stevedore of these safeguards. The trial judge would certainly have been at fault if he had instructed, as the majority now hold he must, that obedience of these rules should be measured by reference to safety measures promulgated by the Secretary of Labor but from which he deliberately excepted shipowners.

The exclusion cannot be erased by deriding it as "a rule of silence". Nor are we free to adopt certain parts of the regulations and ignore others. I would affirm the judgment on review.

APPENDIX B

JUDGMENT BELOW

(Filed November 4, 1963)

Appeals from the United States District Court
for the District of Maryland

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed as to the shipowner, American Export Lines, Inc.; that the third-party claim against the stevedore in this cause, be, and the same is hereby reinstated; and that this case, be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, for retrial, consistent with the opinion of the Court filed herein. The costs on appeals to be borne by American Export Lines, Inc.

J. SPENCER BELL,
United States Circuit Judge.

A true copy,

Teste:

MAURICE S. DEAN,
Clerk.

APPENDIX C

Order Denying Rehearing

(Filed January 7, 1964)

This Court having on November 4, 1963, rendered its decision reversing in part the judgment of the said District Court appealed from in this cause, and remanding the case to the United States District Court for the District of Maryland at Baltimore for retrial, and the American Export Lines, Inc., and Atlantic and Gulf Stevedores, Inc., having on November 29, 1963, filed a petition for rehearing en banc, and the same having been fully considered,

It is now here ordered by this Court that the rehearing en banc asked for be, and the same is hereby denied.

Simon E. Sobeloff,
Chief Judge, Fourth Circuit.

Albert V. Bryan,
United States Circuit Judge.

J. Spencer Bell,
United States Circuit Judge.

A true copy,

Teste:

Maurice S. Dean,
Clerk.

APPENDIX D

STATUTES AND REGULATIONS INVOLVED

The Statute

The applicable statute, Section 41 of the Longshoremen's and Harbor Workers' Compensation Act as amended (33 U.S.C.A. Sec. 941) provides:

§941.—Safety Rules and Regulations—Safe Place of Employment; Installation of Safety Devices and Safeguards.

(a) Every employer shall furnish and maintain employment and places of employment which shall be reasonably safe for his employees in all employments covered by this chapter and shall install, furnish, maintain, and use such devices and safeguards with particular reference to equipment used by and working conditions established by such employers as the Secretary may determine by regulation or order to be reasonably necessary to protect the life, health, and safety of such employees, and to render safe such employment and places of employment, and to prevent injury to his employees. However, the Secretary may not make determination by regulation or order under this section as to matters within the scope of Title 52 of the Revised Statutes and Acts supplementary or amendatory thereto, the Act of June 15, 1917 (ch. 30, 40 Stat. 220), as amended, or section 1333(e) of Title 43.

Studies and Investigations by Secretary.

(b) The Secretary, in enforcing and administering the provisions of this section, is authorized in addition to such other powers and duties as are conferred upon him—

(1) to make studies and investigations with respect to safety provisions and the causes and prevention of injuries in employments covered by this chapter and from time to time make to Congress such recommendations as he may deem proper as to the best means of

preventing such injuries, and in making such studies and investigations to cooperate with any agency of the United States or with any State agency engaged in similar work;

(2) to utilize the services of any agency of the United States or any State agency engaged in similar work (with the consent of such agency) in connection with the administration of this section;

(3) to promote uniformity in safety standards in employments covered by this chapter through cooperative action with any agency of the United States or with any State agency engaged in similar work;

(4) to provide for the establishment and supervision of programs for the education and training of employers and employees in the recognition, avoidance, and prevention of unsafe working conditions in employments covered by this chapter, and to consult with and advise employers as to the best means of preventing injuries;

(5) to hold such hearings, issue such orders, and make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this section, and for such purposes the Secretary and the district courts shall have the authority and jurisdiction provided by section 39 of Title 41, and the Secretary shall be represented in any court proceedings as provided in section 921a of this title.

Inspection of Places and Practices of Employment.

(c) The Secretary or his authorized representative may inspect such places of employment, question such employees, and investigate such conditions, practices, or matters in connection with employment subject to this chapter, as he may deem appropriate to determine whether any person has violated any provision of this section, or any rule or regulation issued thereunder, or which may aid in the enforcement of the provisions of this section. No em-

ployer or other person shall refuse to admit the Secretary or his authorized representatives to any such place or shall refuse to permit any such inspection.

Requests for Advice; Variations from Safety Rules and Regulations.

(d) Any employer may request the advice of the Secretary or his authorized representative, in complying with the requirements of any rule or regulation adopted to carry out the provisions of this section. In case of practical difficulties or unnecessary hardships, the Secretary in his discretion may grant variations from any such rule or regulation, or particular provisions thereof, and permit the use of other or different devices if he finds that the purpose of the rule or regulation will be observed by the variation and the safety of employees will be equally secured thereby. Any person affected by such rule or regulation, or his agent, may request the Secretary to grant such variation, stating in writing the grounds on which his request is based. Any authorization by the Secretary of a variation shall be in writing, shall describe the conditions under which the variation shall be permitted, and shall be published as provided in section 1002 of Title 5. A properly indexed record of all variations shall be kept in the office of the Secretary and open to public inspection.

Jurisdiction to Restrain Violations.

(e) The United States district courts, together with the District Court for the Territory of Alaska, shall have jurisdiction for cause shown, in any action brought by the Secretary, represented as provided in section 921a of this title, to restrain violations of this section or of any rule, regulation, or order of the Secretary adopted to carry out the provisions of this section.

Violations and Penalties.

(f) Any employer who, willfully, violates or fails or refuses to comply with the provisions of subsection (a) of this section, or with any lawful rule, regulation, or order

adopted to carry out the provisions of this section, and any employer or other person who willfully interferes with, hinders, or delays the Secretary or his authorized representative in carrying out his duties under subsection (c) of this section by refusing to admit the Secretary or his authorized representative to any place, or to permit the inspection or examination of any employment or place of employment, or who willfully hinders or delays the Secretary or his authorized representative in the performance of his duties in the enforcement of this section, shall be guilty of an offense, and, upon conviction thereof, shall be punished for each offense by a fine of not less than $100 nor more than $3,000; and in any case where such employer is a corporation, the officer who willfully permits any such violation to occur shall be guilty of an offense, and, upon conviction thereof, shall be punished also for each offense by a fine of not less than $100 nor more than $3,000. The liability hereunder shall not affect any other liability of the employer under this chapter.

Inapplicability to Certain Employments.

(g) (1) The provisions of this section shall not apply in the case of any employment relating to the operations for the exploration, production, or transportation by pipeline of mineral resources upon the navigable waters of the United States, nor under the authority of sections 1331-1345 of Title 43, nor in the case of any employment in connection with lands (except filled in, made or reclaimed lands) beneath the navigable waters as defined in sections 1301-1303 and 1311-1315 of Title 43 nor in the case of any employment for which compensation in case of disability or death is provided for employees under the authority of the Act of May 17, 1928 (ch. 612, 45 Stat. 600), as amended, nor under the authority of sections 1651-1654 of Title 42.

(2) The provisions of this section, with the exception of paragraph (1) of subsection (b) of this section, shall not be applied under the authority of the Act of September 7, 1916 (ch. 458, 39 Stat. 742), as amended. As amended Aug. 23, 1958, Pub. L. 85-742, §1, 72 Stat. 835.

The Regulations

29 Code of Federal Regulations, Subtitle A, Part 9 (effective March 21, 1960):

Foreword

This pamphlet contains safety and health regulations that have been determined by the Secretary of Labor to be reasonably necessary to protect the life, health and safety of employees engaged in longshoring, ship repairing, and related employments covered by section 41 of the Longshoremen's and Harbor Workers' Compensation Act, as amended. * * *.

* * * * * *

These regulations are mandatory with respect to employers subject to the Act, and affected persons should familiarize themselves with the contents of this publication. * * *.

* * * * * *

§9.1—Purpose and Authority.

(a) The Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424; 33 U.S.C. 901 et seq.) provides compensation for injuries suffered by employees when they are working for private employers within the Federal maritime jurisdiction on the navigable waters of the United States, including dry docks. Public Law 85-742, 72 Stat. 835, approved August 23, 1958, which amends section 41 of the Longshoremen's and Harbor Workers' Compensation Act, as amended (44 Stat. 1444; 33 U.S.C. 941) requires, among other things, that every employer of the aforementioned employees "shall install, furnish, maintain, and use such devices and safeguards with particular reference to equipment used by and working conditions established by such employers as the Secretary may determine by regulation or order to be reasonably necessary to protect the life, health, and safety of such employees, and to render safe such employment and places of employment, and to prevent injury to his employees." It is the purpose of the regulations of this part to carry out the intent of Public Law 85-742.

(b) Pursuant to Public Law 85-742 the regulations of this part do not make determinations with respect to matters under the control of the United States Coast Guard within the scope of Title 52 of the Revised Statutes and Acts supplementary or amendatory thereto (46 U.S.C. 1-1388, passim), including, but not restricted to, the master, ship's officers, crew members, design, construction, and maintenance of the vessel, its gear and equipment; to matters within the regulatory authority of the United States Coast Guard to safeguard vessels, harbors, ports, and waterfront facilities under the provisions of the Espionage Act of June 15, 1917, as amended (40 Stat. 220; 50 U.S.C. 191 et seq.; 22 U.S.C. 401 et seq.) or to matters within the regulatory authority of the United States Coast Guard with respect to lights, warning devices, safety equipment and other matters relating to the promotion of safety of lives and property under section 4(e) of the Outer Continental Shelf Lands Act of August 7, 1953 (67 Stat. 462; 43 U.S.C. 1333).

§9.2—Scope and Responsibility.

(a) The responsibility for compliance with the regulations of this part is placed upon "employers" as defined in section 9.3(c) of this part.

(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.

§9.3—Definitions.

(a) The term "shall" indicates provisions which are mandatory.

(b) The term "Secretary" means the Secretary of Labor.

(c) The term "employer" means an employer any of whose employees are employed, in whole or in part, in longshoring operations or related employments as defined here-

in within the Federal maritime jurisdiction on the navigable waters of the United States.

* * * * * *

§9.4—Penalty.

(a) As provided in Public Law 85-742, any employer who, willfully, violates or fails or refuses to comply with the provisions of the regulations of this part * * * shall be punished for each offense by a fine of not less than $100 nor more than $3,000; * * *.

* * * * * *

§9.43—Handling Beams and Covers.

* * * * * *

(b) Strongbacks shall be laid on their sides, or stood on edge close together and lashed.

(c) Strongbacks, hatch covers and pontoons shall be so placed as not to interfere with a safe walkway from rail to hatch coaming or fore and aft, and so secured that they cannot be tipped over or dragged into hatches or overboard by drafts or gear. Dunnage or other suitable material shall be used under and between tiers of strongbacks and pontoons.

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§9.91—Housekeeping.

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(d) Loose paper, dunnage and debris shall be collected as the work progresses and be kept clear of the immediate work area.

* * * * * *